

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7138

To be argued by
MELVYN L. CANTOR

United States Court of Appeals

For the Second Circuit

FRUEHAUF CORPORATION,

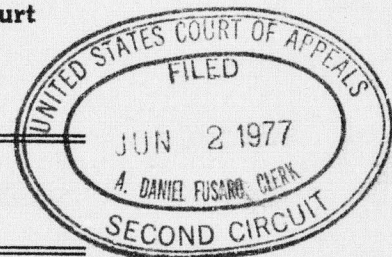
Plaintiff-Appellant,
against

SEATRAN LINES, INC. and
STRICK CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES



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-against-

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District Court For The Southern
District Of New York

BRIEF OF DEFENDANTS-APPELLEES
SEATRAN LINES, INC. and STRICK CORPORATION

Preliminary Statement

This is an appeal by Fruehauf Corporation ("Fruehauf") from a judgment entered on February 28, 1977 in favor of Seatrain Lines, Inc. ("Seatrain") and Strick Corporation ("Strick") dismissing Fruehauf's complaint after a

trial before the Court. Judgment was entered upon the decision and opinion of the Honorable J. Edward Lumbard, United States Circuit Judge, sitting by designation.

Counterstatement Of The Case

A. The Evidence Adduced At Trial

Since the decision appealed from is essentially factual in nature -- there never having been any dispute between the parties as to the applicable legal principles involved -- it would seem appropriate to present to this Court a somewhat detailed summary of the evidence presented at trial. Defendants-appellees respectfully submit that this evidence overwhelmingly supports Judge Lumbard's decision that the residual equipment at issue in this litigation was purchased by Strick in its January 11, 1966 Agreement ("the 1966 Agreement") with Fruehauf.*

1. Background

The Strick Company ("Strick Company") was acquired by Fruehauf on January 1, 1956. Prior to its acquisition, it was engaged in the business of manufacturing, selling and leasing trailers and accessories. After its acquisition,

* The 1966 Agreement is in evidence as PX 4 (A. 298 et seq.).

it became the Strick Division of Fruehauf ("Strick Division"), but remained, except for certain financial matters, an independent, autonomous organization: It maintained its own management, advertising, sales, design, manufacturing, engineering, and other departments -- for example, the equipment at issue here was of a "uniquely Strick" design, designed and manufactured exclusively by the Strick Division. The Strick Division also maintained its own leasing operations: The lease involved in this litigation, a 96 month lease to Seatrain of 100 refrigerated containers, 100 bogies (running gear) and 40 diesel motor generators ("the Seatrain lease"; PX 1, 2, and 3, A. 279 et seq.) was negotiated by Strick Division officers, and executed on Strick Division's behalf by Martin Bachman, who at that time was a vice president of the Strick Division (Bachman, A. 187, 190).*

2. Ownership of the Residual Equipment
Prior to January 11, 1966

Fruehauf's financial management determined in late 1964 to treat the Seatrain lease as a sale for internal accounting purposes (Silverstein, A. 54). Under an assignment dated December 15, 1964 (PX 9, at the ninth page of

* All references to the trial transcript made herein will contain the name of the testifying witness, and the appropriate page reference to the Appendix on appeal.

that exhibit, A. 354), the right to the rental payments to be received on the Seatrain lease was sold to Fruehauf Finance Company ("Fruehauf Finance"), and the Strick Division received a credit on its books for the value of these rental payments (Silverstein, A. 79-80, 138). This much is undisputed. Fruehauf, however, claims in its Brief (at pp. 4-9), that this assignment of the rental payments due under the lease somehow also transferred title to the residual equipment underlying the lease. Despite the fact that this contention was effectively rebutted at trial by plaintiff's own witnesses and, consequently, was not seriously contested in the court below (A. 265), plaintiff-appellant seems to make this contention its major issue on appeal. The issue is totally without merit. As a brief review of the evidence at trial demonstrates:

(a) Mr. Silverstein, Fruehauf's chief financial officer, conceded that he was unaware of the existence of any document transferring title in the residual equipment to Fruehauf Finance (Silverstein, A. 83);

(b) The Strick Division never received any credit or compensation whatsoever, from either Fruehauf or Fruehauf Finance, for any purported transfer of Strick Division's right,

title and interest in the residual equipment underlying the Seatrain lease (Silverstein, A. 83, 138);

(c) With regard to PX 9 (A. 346 et seq.), which plaintiff-appellant now claims proves that the residual equipment under the Seatrain lease was transferred to Fruehauf Finance along with the undisputed right to receive the rental payments (Plaintiff-appellant's Brief, at p. 7), both the chief legal officer, who actually drafted PX 9 (Rushmer, A. 96, 103), and the chief financial officer of Fruehauf at the time the assignment was entered into (Silverstein, A. 8), conceded that the residual equipment under the Seatrain lease was not included in any of the defined categories of assets transferred by the assignment. (Rushmer, A. 118-121; Silverstein, A. 138-140);

(d) Mr. Silverstein conceded on behalf of Fruehauf that, but for the 1966 Agreement, the residual equipment would have been returned to the Strick Division, not to Fruehauf Finance, at the expiration of the Seatrain lease (Silverstein, A. 86); and

(e) In 1965, after the purported assignment of title to the residual equipment, Fruehauf caused the equipment to be registered in the State of Maine, and listed the Strick Division, and not Fruehauf Finance, as the owner of the equipment (DX XX-1, A. 378).

In short, Fruehauf's own witnesses have admitted that no document of sale exists transferring the residual equipment to Fruehauf Finance; that the Strick Division never received any compensation whatsoever for any purported sale of the residual equipment (although it was compensated for the value of the rental payments);* that the residual

* On this point, Fruehauf misinterprets the testimony in the record: Fruehauf states (Plaintiff-appellant's Brief, p. 5) that:

"The defendants contend, and apparently the Court below agreed, that because the compensation received by Strick Division contained no amount specifically earmarked as payment for the residuals, no consideration for such an interest was in fact paid. It is submitted that this does not follow. . . ."

However, the trial court did not base its finding upon any "contention" of the defendants-appellees, but rather upon the clear testimony of Mr. Silverstein, plaintiff-appellant's chief financial officer:

"Q. [by Mr. Cantor, referring to PX 9] That in fact is the proof, is it not, where Seatrain is listed there and the amount listed of \$1,338,240.69, is the proof that the Strick Division got no credit for the residual but only got credit for the lease payments."

"A. Yes, I would agree with that." (A. 138. Emphasis added.)

Thus, the record reflects that there was never any question about "specifically earmarking" the payment made, because it was never intended to cover the value of the residual equipment, but only the value of the rental payments.

equipment, but for the 1966 Agreement, would have been returned to the Strick Division at the expiration of the lease; and that even after the purported assignment, Fruehauf continued to register the residual equipment with the appropriate governmental authorities as the property of the Strick Division.

In response to these admissions by its own chief legal and financial officers, Fruehauf can only argue (without the benefit of any authority in the record) that the internal accounting treatment given a lease by a corporation somehow mystically effects a legal transfer of title to the residual equipment underlying that lease (Plaintiff-appellant's Brief, at pp. 4-5); that this equipment, which Fruehauf values at \$400,000 (Amended Pretrial Order, at A. 33a), was somehow informally transferred from Fruehauf to Fruehauf Finance, a separate corporation, without any indicia of sale (Plaintiff-appellant's Brief, at 5-6); that this Court should, in retrospect, imply the existence of a constructive trust to excuse Fruehauf's failure to produce any evidence of transfer of legal title in the equipment to Fruehauf Finance (Plaintiff-appellant's Brief, at p. 6); that this Court should interpret PX 9 to transfer the residual equipment under the Seatrain lease (Plaintiff-appellant's Brief, at pp. 7-8), when the undisputed testimony of Fruehauf's own witnesses admits that no

such transfer was effected (Rushmer, A. 118-121; Silverstein, A. 138-140); and that this Court should decide this factual issue of what the parties intended on the basis of a hypothetical question of business judgment, apparently gleaned from a textbook on financial management (Plaintiff-appellant's Brief, at pp. 8-9). Defendants-appellees respectfully submit that, even in a hearing de novo, such arguments would have to be characterized as unpersuasive; under the strictly limited standards of review applicable on this appeal (see discussion at pp. 20-23, infra), such contentions must be rejected as frivolous.

3. The Federal Trade Commission
Proceedings and Their Aftermath

Shortly after Fruehauf's acquisition of the Strick Company in 1956, the Federal Trade Commission commenced a proceeding against Fruehauf alleging, inter alia, violations of the Clayton and Federal Trade Commission Acts. Mr. Rushmer, Fruehauf's chief legal officer, was actively involved in these proceedings (A. 96). On May 28, 1965, the Federal Trade Commission issued a final order which required, in pertinent part, that:

"Respondent, Fruehauf Trailer Company [now Fruehauf Corporation, plaintiff-appellant herein], a corporation, and its officers, directors, agents, representatives, and employees shall, within one (1) year from the date this order becomes final, divest itself absolutely, in good faith, of all assets of its Strick Trailers Division and such other assets as may be necessary to restore the Strick Company and Strick Plastics Corporation as a going concern and effective competitor in

all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent.

"As used in this order, 'assets' shall include any properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks, and good will of whatever description." Matter of Fruehauf Trailer Co., 67 F.T.C. 878, at 939-40 (1965). (Emphasis added.)

Fruehauf appealed from this divestiture order to the United States Court of Appeals for the Seventh Circuit, while at the same time, it entered into settlement negotiations with the Federal Trade Commission. (Rushmer, A. 126-28). These negotiations eventually resulted in a joint motion by Fruehauf and the Commission to the Court of Appeals, which in turn issued an order on January 21, 1966 reiterating the mandate of the above-quoted order, in substantially identical language (DX AD, A. 371).^{*} The negotiations which resulted in the 1966 Agreement were carried on with the above-quoted language "in front of [the negotiators] practically all the time" (Bachman, A. 192), and both sides to the negotiations intended the 1966 Agreement to comply fully with the final order of the Court of Appeals (Silverstein, A. 21; Rushmer, A. 124-26; Bachman, A. 192).

^{*} The negotiations did result in Fruehauf's being allowed to keep its Hobbs Division, which had been ordered divested by the Commission. Compare Matter of Fruehauf Trailer Co., supra, 67 F.T.C. at 939-940, with DX AD, A. 371.

In response, Fruehauf contends that Judge Lombard and the defendants-appellees:

"have refused to look at the Order of the Court of Appeals from its 'four corners'. Instead, they have focused myopically on a few words taken out of context, i.e., 'all assets' of the Strick Division and 'any properties, rights and privileges tangible and intangible', and by over-reliance on literalism and semantics have emerged with a conclusion as to the Order's requirements that we believe is seriously distorted." (Plaintiff-appellant's Brief, at p. 12).

The position which apparently generated the above-quoted criticism was merely defendants-appellees' contention, and Judge Lombard's conclusion, that the Order means precisely what it says: that Fruehauf was required to divest itself absolutely of all assets of its Strick Division and such other assets as may be necessary. In place of this undue "literalism", Fruehauf offers the novel theory (Plaintiff-appellant's Brief, at pp. 11-12) that it is free subjectively to pick and choose which among its assets it will divest; in its words:

"[o]ne does not comply with such an order by counting nuts and bolts. Rather, one complies by looking to the substantial result, a result in this case concerning which neither Strick, the FTC nor the Court has voiced any complaint whatsoever." (Plaintiff-appellant's Brief, at p. 11).

This statement is remarkable, especially in light of defendants-appellees' vigorous defense of this action, and the opinion rendered by the court below. One can only speculate

about what the Commission, after its hard-fought nine year litigation for the order against Fruehauf, would think of such a cavalier attitude towards the mandated divestiture.

Suffice it to say that substantial evidence exists in the record to support Judge Lombard's finding that the residual equipment remained an asset of the Strick Division until the 1966 Agreement, and as such, was clearly required to be divested under the Order's direction that Fruehauf

"... divest itself absolutely, in good faith, of all assets of its Strick Trailers Division. . ."

It is respectfully submitted that Judge Lombard's findings in this regard are unquestionably correct.*

4. The 1966 Agreement

Prompted by the Commission's order, Fruehauf entered into negotiations to sell its Strick Division to a group headed by officers of that Division. At "global" meetings, at which Fruehauf was represented by its president, Mr. Grace, and the purchasing group was represented by

* Moreover, even if this Court were to conclude that the residual to the equipment had somehow been transferred out of the Strick Division prior to January 11, 1966, it is clear that the final orders of the Federal Trade Commission and the Court of Appeals, with which the parties were attempting to comply, required divestiture of an asset, such as the residual equipment, which was so uniquely associated with the Strick Division.

Messrs. Katz (president of the Strick Division) and Bachman (Bachman, A. 191), the overall price, terms, and the basic nature of the agreement were worked out. A working draft of the agreement was turned over to groups of attorneys and accountants for the preparation of the definitive agreement. The parties intended the agreement to comply fully with the language of the Commission and Court of Appeals Orders (Silverstein, A. 21; Rushmer, A. 124-126; Bachman, A. 192), and, as the parties knew that the agreement would have to be submitted to and approved by the Commission (Rushmer, A. 105), it is not at all surprising that, as Mr. Bachman testified:

" . . . all the negotiations that took place took place with that language [of the order] in front of us practically all the time."
(Bachman, A. 192).

The parties decided that, instead of attempting to list each and every asset which was to be transferred under the agreement in minute detail, the assets would be described in the contract under broad categories adopted from the Strick Division's balance sheet (Silverstein, A. 23; Rushmer, A. 100-01). Mr. Bachman, who was present at all of the negotiating sessions (Bachman, A. 191), established that the category of "leased equipment" was considered during the negotiations (Bachman, A. 194), and that this equipment was intended by both parties to be transferred under the

category "Property, Plant and Equipment" in the sale agreement (Bachman, A. 195-97; see Silverstein, A. 51-52).

Because some problems were envisioned regarding the fact that some of this equipment (for example, the residual equipment under the Seatrain lease) was not given a balance sheet value, it was specifically provided in the agreement that "Property, Plant and Equipment" include, inter alia:

"all movable equipment wherever located used in the operations of the Strick Division, whether or not expensed or charged off or for other reasons not given a carrying value on the Comparative Balance Sheet or the Approved Balance Sheet." (PX 4, A. 298, 301-02; Bachman, A. 196-97).*

Fruehauf sets forth several novel arguments explaining why this Court should ignore both the language of the agreement, and Mr. Bachman's cogent testimony, which the court below expressly credited (A. 269), regarding the intent of the parties to the agreement. First, we are told that the equipment is not represented on the Strick Division's balance sheet, and therefore, was not transferred (Plaintiff-appellant's Brief, at pp. 15-17). In so arguing, Fruehauf ignores the fact that it is undisputed that the residual equipment in question here had

* It is noteworthy that, of the purchase price of approximately \$39,000,000, \$17,000,000 was for assets which were given no specific value on the Strick Division's balance sheet (Bachman, A. 209-210).

no balance sheet value (because of Fruehauf's accounting policy (Silverstein, A. 53-4; Bachman, A. 194-95)), and therefore, would not be expected to appear on the balance sheet; under the relevant provision of Section 2(a) of the agreement, it is, by the parties' own definition, equipment "not given a carrying value on the Comparative Balance Sheet or the Approved Balance Sheet." Next, Fruehauf readily concedes that the equipment at issue here was used in the operations of the Strick Division (Plaintiff-appellant's Brief, at p. 18), but then attempts to vitiate this concession with the following analysis:

"The ultimate rationale [for the trial court's finding] rests on two bases: The first is that the 'operations' of the Strick Division, included 'the leasing of its products'. Of course. But, the activity of leasing, the function, is something quite different from the product leased. And, present operations are the operations intended, not past transactions." (Plaintiff-appellant's Brief, at p. 18; emphasis in original).

By this, Fruehauf apparently seriously contends that equipment used in a company's leasing operations somehow ceases to be equipment used in a company's leasing operations once it has been leased. No authority is cited for this extraordinary proposition, with good reason.

Fruehauf's climactic argument on this point attempts to chastise the trial court and defendants-appellees for what is perceived to be their deficient legal analysis:

"The Court's final observation in Footnote 5 to the effect that 'the need for such a [no carrying value] clause is particularly evident' in order to catch equipment such as Seatrain equipment is of course nothing more than circular reasoning. Such a clause is 'needed' only if you first conclude that Strick is entitled to the equipment. If you start with the opposite premise that Fruehauf is entitled to it, there is no need for such a clause." (Plaintiff-appellant's Brief, at p. 19; emphasis added.)

Defendants-appellees readily adopt the last two sentences of the above analysis: the clause does exist, it was specifically added by the parties to the agreement, and the reason it was added was that the parties did decide that equipment of this type was to be transferred to Strick.

In summary, it is respectfully submitted that in light of the specific language of the Orders of the Federal Trade Commission and the Court of Appeals; the parties' clear intent to comply fully with those mandates; the Federal Trade Commission's approval of the 1966 agreement; the language of the 1966 Agreement and the testimony regarding the intention of the parties with respect to that language; the admission on the part of Fruehauf that, but for the ordered divestiture, the equipment in question would have been returned to the Strick Division; the fact that, at all relevant times, Fruehauf held the Strick Division out as the owner of the equipment; and the fact that the leasing of equipment of this type was a significant

aspect of the Strick Division's operations, it must be concluded that there is substantial evidence in the record to support Judge Lumbard's finding that the residual equipment under the Seatrain lease was transferred to Strick by the 1966 Agreement.

5. The Behavior of the Parties
Subsequent to the 1966 Agreement

Contrary to Fruehauf's assertions (Plaintiff-appellant's Brief, at pp. 21-23), the record is replete with evidence demonstrating that at all times after the signing of the 1966 Agreement, Strick consistently exercised its rights and obligations of ownership of the residual equipment, and that Seatrain consistently recognized Strick's title to the equipment. For example, Strick consistently registered the equipment as its property with the State of Maine (DX XX-2 through XX-4, A. 382-90), while Fruehauf never attempted to register the equipment after the 1966 Agreement had been signed (Silverstein, A. 64-65). Strick repeatedly informed Seatrain that Strick was the owner of the equipment (Weber, A. 226), and Seatrain accepted Strick's claims, rejecting those of Fruehauf (Weber, A. 222, 226).^{*} At the expiration of the lease, Seatrain purchased the equipment from Strick,

* Fruehauf makes much of the fact that Seatrain paid Fruehauf for two wrecked trailers in September, 1972. (PX 6, A. 343). The testimony of Mr. Weber, who was no longer an employee of Seatrain at the time of trial, clearly dispells Fruehauf's contention that Seatrain acknowledged Fruehauf's alleged ownership:

not Fruehauf (Weber, A. 222). Seatrain's conduct is especially demonstrative: because of the dual offers of indemnity, it had nothing to gain or lose by picking one or the other of the claimants; it chose Strick.

The alleged indicia of ownership which Fruehauf has dredged up on its own behalf are necessarily feeble: regarding the matter of the Milwaukee Motor Transport lease situation, it is sufficient to note that the similarity or dissimilarity of that lease to the Seatrain one was a matter of conflicting testimony by Messrs. Silverstein and Bachman; Judge Lumbard, as the trier of fact, weighed their respective contentions and credited Mr. Bachman's testimony over that of Mr. Silverstein. (A. 269, 275-76). Indeed, there is substantial evidence in the record that the two situations were completely dissimilar: unlike the Seatrain lease, the Milwaukee lease contained an option

(Footnote continued from preceding page.)

"Q. [By Mr. Cantor:] Was there any intention, sir, on your part, on behalf of Seatrain, to indicate that Seatrain believed that Fruehauf actually owned the equipment?"

"A. No, sir. The tenor of this was to reimburse the party to whom we were paying the rental for the equipment that was lost, damaged, and also to protect Seatrain's interest and by that time we knew there was a disagreement between the two companies." (A. 220).

It is interesting that Fruehauf claims this transaction demonstrates that Fruehauf owned the equipment at that time (September, 1972): under the theory which Fruehauf propounds in its brief, Fruehauf Finance, and not Fruehauf, owned the equipment until December 4, 1972, when the equipment was purportedly reassigned. (PX 8, A. 345).

to the lessee to purchase the residual equipment at a nominal price which was intended to insure that the option would be exercised - thus, the lease was, in essence, a conditional sale (with no realistic possibility of a residual) and was always treated as such by the Strick Division and Fruehauf (Bachman, A. 204). Most importantly, in the case of the Milwaukee lease (unlike the Seatrain situation), the Strick Division was compensated by Fruehauf Finance not only for the lease payments but also for the option price included as a portion thereof (Bachman, A. 204).

Fruehauf also places great emphasis upon the fact that it never executed an assignment to Strick specifically listing the residual equipment under the Seatrain lease. The reasons for this are obvious: first, Fruehauf did execute a "General Assignment and Bill of Sale" to Strick (PX 5, A. 337), which was legally sufficient to convey title to all assets covered by the sale agreement. Second, paragraph 14(a) of the sale agreement (PX 4, at 321) as Fruehauf notes (Plaintiff-appellant's Brief, p. 23), covered situations in which a third-party lessee contested Strick's ownership of the equipment. In the present situation, the third-party, Seatrain, readily conceded Strick's ownership of the equipment, and thus no

such document was ever necessary. Moreover, even if it had been necessary, a request for it would have clearly been futile, as Fruehauf itself actively claimed ownership.

B. Judge Lumbard's Opinion

In his opinion (reprinted at A. 262-276), Judge Lumbard carefully sets forth the factual background of the litigation, and presents his findings on the basis of the evidence discussed above. With regard to Fruehauf's present claim that ownership of the residual equipment had been transferred to Fruehauf Finance in 1964, Judge Lumbard found that, at trial, Fruehauf made no serious effort to support that contention, and in fact, that the testimony of Mr. Silverstein, Fruehauf's own controller, clearly refuted the allegations that any documentation of a transfer of title existed, or that the Strick Division ever received any compensation for the alleged transfer. (A. 264-65). After a careful evaluation of the language of the Federal Trade Commission and Court of Appeals divestiture Orders, and the unanimous testimony that it was the intent of the negotiators to comply fully with that language, Judge Lumbard credited Mr. Bachman's testimony that the "all movable equipment" language of Section 2(a) of the 1966 Agreement (A. 301-02) was intended by the parties to cover just such a situation as

was presented by the residual equipment under the Seatrain lease, and to provide a necessary "catch-all" category, so that the divestiture orders would not be inadvertently violated. (A. 266-270). In evaluating Fruehauf's claim that the subsequent conduct of the parties demonstrated Fruehauf's ownership of the residual equipment, Judge Lumbard noted that there was substantial evidence which rebutted each of Fruehauf's claims, and that, in the final analysis, the court credited the testimony of Messrs. Weber and Bachman in this area over that of Mr. Silverstein. (A. 270-72). Thus, the opinion itself reflects the fact that Judge Lumbard, sitting as the trier of fact, carefully evaluated the credibility of the witnesses, weighed the conflicting evidence presented, and reached the conclusions appealed from on the basis of substantial evidence in the record. Under these circumstances, the law is clear that Judge Lumbard's decision should be affirmed.

ARGUMENT

THE FINDINGS BELOW ARE BASED
UPON SUBSTANTIAL EVIDENCE IN
THE RECORD, AND SHOULD BE AFFIRMED

The judgment entered below, and the written opinion of Judge Lumbard incorporating his factual findings, were prepared by the Judge as the trier of fact after he had heard all of the evidence in this action, assessed the

credibility of the witnesses, and had weighed the conflicting evidence presented. These findings, based upon substantial evidence in the record, cannot be regarded as clearly erroneous, and hence, should be affirmed in all respects by this Court.

The Applicable Standards Upon
Review By This Court

The extraordinarily heavy burden which must be borne by Fruehauf on this appeal is aptly illustrated by the formulation presented in Anderson v. Federal Cartridge Corp., 156 F.2d 681 (8th Cir. 1946):

"The findings of the court are presumptively correct and will not be set aside unless resulting from an erroneous view of the law or are clearly against the weight of the substantial evidence, and in considering this question we view the evidence in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence compelled a finding in his favor." 156 F.2d at 684.

This strong presumption in favor of the correctness of the trial court's evaluation of the evidence has been codified in the provision of Rule 52(a) of the Federal Rules of Civil Procedure that

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses",

and has been strongly supported throughout the federal court system. E.g., Guzman v. Pichirilo, 369 U.S. 698, 701-03 (1962); DeTore v. Great Atlantic & Pacific Tea Co., 411 F.2d 613 (3d Cir. 1969); Sumrall v. Resolute Ins. Co., 377 F.2d 671 (5th Cir. 1967); Dearborn National Cas. Co. v. Consumers Petroleum Co., 178 F.2d 277 (7th Cir. 1949); The Quarrington Court, 122 F.2d 266 (2d Cir. 1941). Indeed, several courts have felt so strongly about this principle that they have reformulated it to emphasize the broad restraints it places upon a reviewing court: this Court, for example, has stated that it will reverse the trier of fact only if it reaches "a definite and firm conviction that a mistake has been committed" (Esso Standard Oil Co. v. The S.S. Kaposia, 259 F.2d 486, at 489 (2d Cir. 1958)), and has indicated that an appellate court, upon the review of the trial court's findings, cannot substitute its judgment for that of the trial court, even if the appellate court would have reached a different decision on the evidence, unless the trial court's findings were clearly erroneous. United States v. Jones Beach State Parkway Authority, 255 F.2d 329, 333 (2d Cir.), cert. denied 358 U.S. 832, 79 S. Ct. 55, 3 L. Ed. 2d 55 (1958).

As Judge Lumbard's opinion indicates, the resolution of many of the issues raised at trial turned upon his

evaluation of the credibility of the witnesses; in such a case, as this Court has noted,

"[t]he burden on an appellant, who seeks to reverse a judgment for error in fact, to show that essential findings are clearly erroneous, is, indeed, a heavy one when, as in this instance, decision must turn largely upon the credibility of witnesses the trial judge saw and heard testify." Hedger v. Reynolds, 216 F.2d 202, at 203 (2d Cir. 1954). See also, United States v. Oregon State Med. Soc., 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); Intern. Railways of Cent. America v. United Brands, 532 F.2d 231 (2d Cir. 1976); Barnett v. Kirshner, 527 F.2d 781 (2d Cir. 1975); St. Louis Typographic Union v. Herald Co., 402 F.2d 553 (8th Cir. 1968); Scotco, Inc. v. Dormeyer Indus., 402 F.2d 336 (7th Cir. 1968).

Thus, on review by this Court, the standards which must be applied in evaluating the findings made below by Judge Lombard require that the judgment be affirmed unless this Court, viewing the evidence in a light most favorable to defendants-appellees, and resolving all issues of credibility in favor of the findings made by the court below, reaches the specific conclusion that the judgment appealed from was "clearly erroneous" and is unsupported by substantial evidence in the record. As the detailed analysis of the evidence adduced at trial demonstrates (supra, pp. 2-18), substantial evidence does exist in support of Judge Lombard's findings; thus, his decision should be affirmed.

Conclusion

For all the reasons stated above, Judge Lombard's decision, and the judgment entered thereon dismissing the complaint, should be affirmed in all respects.

Respectfully submitted,

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